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NO. 05420

IN THE

SUPREME COURT OF THE UNITED STATES

MIRTHA VALDIVIA ACOSTA,

Petitioner

v.

U. S. ATTORNEY GENERAL

Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeal for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question One: Whether the Court of Appeals erred in requiring substantial constitutional issues to warrant review of Petitioner's case.

Question Two: Whether this Court's statutory interpretation in the St. Cyr decision created disparate treatment between aliens who entered into a plea agreement and those aliens who were convicted by a jury trial.

CORPORATE DISCLOSURE STATEMENT

No parties are corporations. Sup. Ct. R. 29.6

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mirtha Valdivia-Acosta, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeal (App. 24a-25a) is not reported. The Opinion of the Board of Immigration Appeals (App. 21a, 23a) is not reported. The Opinion of the Immigration Judge (App. 10a, 11a,13a-19a) is not reported.

JURISDICTION

Appellant seeks a writ of certiorari and appeals a final order of removal from the United States Court of Appeals for the Eleventh Circuit ("11th Cir.") pursuant to 28 U.S.C. § 1252(a)(2)(D) (1990) and 28 U.S.C. 1254(1)(1948). Section 1252(a)(2)(D) does not preclude constitutional claims or questions of law despite statutory limitations of review noted within Section 1252(a)(2). *Id*; See Cabrera-Alvarez v. Gonzales, Docket No. 04-72487, 9th Cir., Filed September 8, 2005); citing to Fernandez–Ruiz v. Gonzales, 410 F.3d 585, 587 (9th Cir. 2005) (interpreting the amendments to 8 U.S.C. §1252 enacted in the REAL ID Act of 2005; Pub.L. No. 109-113, 119 Stat. 231).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

8 U.S.C. § 1252(a)(1) (1990)

8 U.S.C. § 1252(a)(2)(B) (1990)

8 U.S.C. § 1252(a)(2)(B)(i) (1990)

8 U.S.C. § 1252(a)(2)(C) (1990)

8 U.S.C. § 1252(a)(2)(D) (1990)

21 USC Sec. 841(a)(1)

21 USC Sec. 846

18 USC Sec. 2

INA § 212 (c)

INA § 237 (a)(2)(B)(i)

INA § 237 (a)(2)(A)(iii)

INA § 242 (a)(2)(B)(i)

INA § 242 (a)(2)(B)

INA § 242 (a)(2)(C)

INA § 245

Antiterrorism and Effective Death Penalty Act (AEDPA) Pub.L. No. 194-132, 110 Stat. 1214

Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) Pub. L. No. 104-208, 110 Stat. 3009

STATEMENT OF THE CASE

Petitioner is a 44 year-old grandmother of a United States Citizen grandchild and Mother of two United States Citizen

children. She is a citizen of Cuba. Petitioner became a Lawful Permanent Resident on April 5, 1981 and had no problems with the law until 1988. In 1988 Petitioner was charged and convicted of the offenses of possession with the intent to distribute at least 500 grams of cocaine, in violation of 21 USC Sec. 841(a)(1) and 18 USC Sec. 2, as well as conspiracy to possess with the intent to distribute cocaine, in violation of 21 USC Sec. 846. She was sentenced to seven years of imprisonment followed by four years of supervised release. She appealed her conviction and said conviction was affirmed. Petitioner served her time and was released in 1994. Upon her release, a progress report was issued and there was no indication of INS detainers or current charges for the Petitioner. On August 31, 1992, the INS issued a Record of Deportable Alien, however, Petitioner was not detained at that time.

On July 1, 2002, the INS issued a letter to Petitioner requesting that she appear on August 1, 2002. Due to re-assignment to a new deportation officer, the Petitioner and her Counsel were issued a Notice to Appear on August 28, 2002. Petitioner and Counsel appeared on August 28, 2002 at which time Respondent was served with a Notice to Appear at EOIR in early 2003 (and an Order of Supervision) stating that she was removable pursuant to INA Sec. 237(a)(2)(B)(i) because of her conviction of a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana. The Service placed Petitioner in removal proceedings specifically because she was convicted -not by entering into a plea agreement.

At the November 8, 2002 Master Calendar in Petitioner's Removal case, Petitioner admitted to the four allegations and

also conceded removability. The Service then informed the Court that it intended to amend the charges to include an aggravated felony charge (which it did on January 8, 2003). The Petitioner then requested the following forms of relief: 212(c) Waiver, or in the alternative, 212(h) Waiver, and also Cancellation of Removal for Permanent Resident Aliens, contending that she was not an aggravated felon and was therefore qualified for Cancellation of Removal for Permanent Resident Alien to restore her status as a Lawful Permanent Resident of the United States.

The Immigration Judge denied Petitioner's request on the basis that she did not fall within the scope of the St. Cyr decision since her conviction was not obtained through a plea agreement. The Board of Immigration of Appeals affirmed the opinion initially without opinion. However, upon its denial of Petitioner's Motion to Re-open, the BIA issued an opinion indicating its agreement with the Immigration Judge. The Eleventh Circuit Court of Appeals held the Motion to Re-open was barred and no substantial legal question warranted review.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals erred in requiring substantial constitutional issues to warrant review of Petitioner's case.

A. Standard of review and applicable law.

For issues of statutory interpretation that hinge upon interpretation of the [law] in a manner consistent with international law, the Court of Appeals has jurisdiction. See Cabrera-Alvarez v. Gonzales, 2005 U.S. App. LEXIS 19373

(9th Cir. Sept. 8, 2005). Notwithstanding the jurisdictional bar within Section 1252(a)(2)(C), the Court of appeals is authorized to review constitutional claims or questions of law. Cabrera-Alvarez, 2005 U.S. App. LEXIS 19373 (9th Cir. Sept. 8, 2005). The Court of Appeals has reviewed questions of law, particularly those reviews of the INA, de novo. See e.g. Melkonian v. Ashcroft, 320 F.3d 1061 (9th Cir. 2003).

The Court of Appeals reviews decisions made by the Board. The Court normally does not consider the rulings and findings of immigration judges unless they impact the Board's decision. Since the Board affirmed the immigration judge's findings and conclusion without opinion (and then later agreed with the IJ), the Court of Appeals can review the immigration judge's findings here. Efe v. Ashcroft, 293 F.3d 899, 908 (5th Cir. 2002). The Board's factual conclusions are reviewed for substantial evidence. Questions of law are reviewed de novo. The Court of Appeals gives great deference to an immigration judge's decisions concerning an alien's credibility. Efe, 293 F.3d at 909.

In Montero-Martinez v. Ashcroft, 277 F. 3d 1137, (9th Cir. 2002), Petitioners sought review of the BIA's decision denying them the underlying discretionary relief of Cancellation of Removal based upon statutory ineligibility for failure to have a qualifying relative. The Petitioners there claimed that their Lawful Permanent Resident, adult daughter was a child, within the meaning of the statute and that they therefore had a qualifying relative. Before proceeding to the merits of the case, the Court looked to see if it was precluded from doing so based upon the INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i). The Court found that, because the determination of whether the Petitioners' adult daughter was a child within the meaning of the statute for cancellation of removal purposes, it had jurisdiction to consider this purely legal and hence non-